

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Tenby, Inc. for Modification or
Clarification of Resolution No. G-3304.

Application 01-12-042
(Filed Dec. 21, 2001)

Application of Southern California Gas Company
(U 904 G) for Modification or Clarification of
Resolution G-3304.

Application 01-12-050
(Filed Dec. 13, 2001)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON MOTION TO CONSOLIDATE AND TO HAVE
THE PARTIES PROVIDE ADDITIONAL INFORMATION**

Summary

This ruling grants the motion of Southern California Gas Company (SoCalGas) to consolidate two separate applications filed by Tenby, Inc. (Tenby) and SoCalGas to modify or clarify Resolution No. G-3304.

The ruling also orders Tenby and SoCalGas to provide certain documents about the pending lawsuit between them. Tenby and SoCalGas are also ordered to file a response as to why the Commission should proceed with hearings or a decision regarding the Resolution, when the ultimate issue that the parties seek clarification or modification of, affects the lawsuit.

Background

Resolution G-3304 was adopted by the Commission on December 21, 2000. In that Resolution, the Commission denied the requests of SoCalGas that were contained in Advice Letters (AL) 2978, 2978-A, 2979, and 2979-A.¹ Ordering paragraph (OP) 2 of the Resolution ordered SoCalGas “to suspend transfers of customers to core subscription service, Schedule G-CS or applicable core service schedules except for those customers where their gas service provider is no longer offering service in California.” SoCalGas was also ordered to “file a new advice letter with tariff language that implements the provision of OP 2 within 7 days,” and that the effective date of that advice letter would be December 21, 2000, subject to the Energy Division’s review of the advice letter for compliance with the Resolution.

On December 13, 2001, SoCalGas filed its “Application For Modification Or Clarification Of Resolution G-3304,” Application (A.) 01-12-050. On December 21, 2001, Tenby filed its “Petition For Modification, Or In The Alternative For Clarification, Of Resolution No. G-3304,” A.01-12-042.² SoCalGas filed a response to Tenby’s application on January 31, 2002, and Tenby filed a reply to SoCalGas’ response on February 11, 2002. Tenby filed a protest to SoCalGas’ application on February 1, 2002.

¹ OP 1 of the Resolution mistakenly referenced AL 2978 twice. The second reference to AL 2978 should have been to AL 2979, as evidenced by the other citations to AL 2979 throughout the Resolution.

² Both applications were originally tendered for filing as petitions for modification of the Resolution. The Commission’s Docket Office changed the petitions for modification to applications.

Motion To Consolidate

On January 31, 2002, SoCalGas filed a motion to consolidate the two applications. SoCalGas' motion states that both Tenby and SoCalGas have asked the Commission "to clarify its intention in Resolution G-3304." Since both applications address the same issue, SoCalGas requests that the two proceedings be consolidated. No one filed any opposition to the motion.

Rule 55 of the Commission's Rules of Practice and Procedure provides that: "Proceedings involving related questions of law or fact may be consolidated." After a review of the applications and the related pleadings, it is clear that the same issue is being addressed in both applications, i.e., modification or clarification of Resolution G-3304. In addition, both applications involve the same questions of law and fact. Accordingly, A.01-12-042 and A.01-12-050 should be consolidated.

Declaratory Relief

The ultimate issue that both parties seek to clarify is whether or not Tenby was entitled to GN-10 gas service from SoCalGas for the month of January 2001. SoCalGas takes the position that Resolution G-3304 suspended all noncore customers, except for those customers whose gas provider is no longer providing gas service in California and those who were actually receiving core or core subscription service, from taking GN-10 service effective December 21, 2000. Tenby's position is that it had a written contract to take GN-10 service from SoCalGas on December 7, 2001, and that this service was to be provided by SoCalGas beginning on January 1, 2001. GN-10 service was not provided to Tenby until February 1, 2001, and Tenby had to find an alternate provider of gas for the month of January 2001.

Tenby requests in its application that the Commission “clarify the Resolution so it is clear that the Resolution did not invalidate core subscription contracts, such as Tenby’s, that were entered into by SoCalGas prior to the effective date of the Resolution.” (A.01-12-042, p. 17.) SoCalGas requests that the Resolution be modified and clarified by including the following proposed OP:

“Noncore customers of SoCalGas that are not actually receiving core or core subscription service as of the effective date of this resolution are not permitted to transfer to core or core subscription service effective January 1, 2001, even if they have requested core or core subscription service from SoCalGas within the time otherwise permitted by SoCalGas’ tariffs.” (A.01-12-050, App. D.)

Both Tenby and SoCalGas acknowledge in their respective applications that a civil lawsuit has been filed by Tenby against SoCalGas in Los Angeles County Superior Court. The lawsuit involves Tenby’s procurement of high-priced gas for the month of January 2001, and the loss in revenue due to the cost of gas and Tenby’s curtailment of oil production. Tenby seeks damages in the approximate amount of \$404,000, plus interest.

SoCalGas states in its application that in its pleadings responsive to the civil suit:

“SoCalGas contends, among other things, that the issue of whether or not Tenby qualified for core subscription service under the language of the Resolution is for this Commission, not the courts, to decide. While Tenby has requested a return to noncore service by letter dated November 29, 2001, clarification of the Commission’s intention in the Resolution will provide SoCalGas and Tenby with assistance in determining the merits of Tenby’s lawsuit.” (A.01-12-050, p. 7.)

The Commission has expressed reservations about issuing a decision in response to a request for declaratory relief. (D.97-10-087 [76 CPUC2d 287, 325-

326]; D.95-01-045 [58 CPUC2d 568, 569, fn. 2]; D.91-11-044 [42 CPUC2d 9].) The ultimate issue that Tenby and SoCalGas want resolved, is a request for declaratory relief, i.e., a decision about whether the Resolution precluded or permitted Tenby from receiving GN-10 service for the month of January 2001. The resolution of this issue is likely to play a determining role in how the civil lawsuit is resolved.

Although the Administrative Procedure Act does not apply to the Commission, Government Code Section 11465.20 provides that a person may apply to an agency for a declaratory decision, and that it is within the agency's discretion to issue a declaratory decision.³ However, subdivision (b) of that code section provides that the "agency shall not issue a declaratory decision if... [t]he decision involves a matter that is the subject of pending administrative or judicial proceedings." A judicial proceeding involving the applicability of the Resolution to Tenby's gas purchases in January 2001 is pending before the Superior Court.

In order to decide whether the Commission should address the relief requested in the two applications, Tenby and SoCalGas shall provide additional information regarding the pending lawsuit in the form of a response to this ruling. Tenby is directed to supply a copy of the civil complaint, and SoCalGas shall provide a copy of its answer to the complaint. Both parties shall also attach any other pleadings, court documents, and transcripts from that civil action which address how the Superior Court may, or plans to, address the applicability

³ The Administrative Procedure Act, set forth in Government Code Section 11340 and following, does not apply to this Commission. (See D.99-01-029; Govt. Code Sections 11370, 11500(a), 11501; Cal. Administrative Hearing Practice (Cont. Ed. Bar 2nd ed.) §§1.37, 1.53, App. A, p. 568.)

of Resolution G-3304 to the dispute pending before that court. Tenby and SoCalGas shall also explain in their responses to this ruling why the Commission should proceed with hearings or a decision regarding the clarification or modification of the Resolution, when that issue is central to the pending civil matter. The responses, and the materials specified above, shall be filed and served on the service list on or before March 25, 2002. Tenby, SoCalGas, and any other interested party, may file a reply to the responses on or before April 8, 2002.

IT IS RULED that:

1. Application (A.) 01-12-042 and A.01-12-050 are consolidated.
2. Tenby, Inc. (Tenby) and Southern California Gas Company (SoCalGas) shall file a response to this ruling with the documents specified above, and an explanation as to why the Commission should proceed with hearings or a decision that clarifies or modifies Resolution G-3004, when that issue is central to the pending civil lawsuit.
 - a. The response shall be served on the service list to these consolidated proceedings, and shall be filed on or before March 25, 2002.
 - b. Tenby, SoCalGas, and any other interested party may file and serve a reply to the responses on or before April 8, 2002.

Dated March 7, 2002, at San Francisco, California.

/s/ JOHN S. WONG
John S. Wong
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Motion to Consolidate and to have the Parties Provide Additional Information on all parties of record in this proceeding or their attorneys of record.

Dated March 7, 2002, at San Francisco, California.

/s/ ERLINDA PULMANO
Erlinda Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

A.01-12-042, A.01-12-050 JSW/jgo